FILED
JUN 20
1991
OFFICE OF THE CLERK

No. 90-6861

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

JOHN J. MCCARTHY,
Petitioner,

v.

MR. MADDIGAN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether a federal prisoner who seeks only money damages for an alleged violation of his constitutional rights by prison officials must, before bringing a *Bivens* action in federal court, exhaust administrative remedies in the Bureau of Prisons, even though the inmate grievance procedure is inherently inadequate since it does not allow for any award of monetary relief.

LIST OF PARTIES

As required by Rule 24.1(b) of the Rules of this Court, petitioner includes the following list of all parties to the judgment below: the plaintiff-appellant is John J. McCarthy; and the defendant-appellees are Mr. Maddigan, Dr. Perry, Dr. Walter, and Dr. Delmuro.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 914 F.2d 1411 and reprinted at J.A. 16. The unpublished orders of the United States District Court for the District of Kansas dismissing petitioner's action and denying his motion for relief from judgment are reprinted at J.A. 12 & 14, respectively.

JURISDICTION

The Tenth Circuit entered judgment on September 20, 1990. J.A. 16. On December 7, 1990, Associate Justice Byron White granted petitioner's application for an en-

largement of time in which to file the petition for certiorari, to and including January 18, 1991. The petition was filed on that date. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND REGULATIONS INVOLVED

This case involves the Eighth Amendment to the United States Constitution as well as federal regulations governing administrative remedies available to resolve the grievances of prisoners in federal custody. The Eighth Amendment provides in full, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The relevant Bureau of Prisons regulations are codified at 28 C.F.R. § 542.10 *et seq.* (1990), and set forth in the appendix to this brief.

STATEMENT

In this *Bivens* action, brought by a prisoner in federal custody against four prison officials, the district court dismissed the complaint on the ground that petitioner had failed to exhaust the Bureau of Prisons (BOP) administrative grievance procedure. The court of appeals affirmed this dismissal, even though the grievance procedure was never designed to serve as a mandatory prelude to *Bivens* litigation and cannot provide the sole relief—damages—sought in such cases.

1. The BOP grievance procedure, codified at 28 C.F.R. §§ 542.10-.16 (1990), authorizes a federal prisoner to "seek formal review of a complaint which relates to any aspect of his imprisonment." *Id.* § 542.10. Prisoner complaints are not entertained, however, if they involve "tort claims, Inmate Accident Compensation claims, Freedom of Information or Privacy Act requests, or complaints on behalf of other inmates." *Id.* § 542.12. Under the procedure, a prisoner must first seek "informal resolution" of his claim by consulting with prison "staff." *Id.* § 542.13

(a). If these informal efforts fail, the prisoner may file a "formal written complaint" with the warden "within fifteen (15) calendar days of the date on which the basis of the complaint occurred." *Id.* § 542.13(b). If the warden fails to respond to the inmate's satisfaction within fifteen more days, the inmate has twenty days to appeal to the BOP Regional Director. *Id.* §§ 542.14-.15. The Regional Director, in turn, has thirty days to respond. *Id.* § 542.14. If the inmate is dissatisfied with this response, he may appeal to the BOP General Counsel within thirty days. *Id.* § 542.15. The General Counsel must then provide the BOP's final response within thirty days. *Id.* § 542.14.[1]

The regulations include no provision for any monetary payments to grievants. Nor do they require that any particular factfinding method be employed by prison officials in responding to a prisoner's claims. *See id.* § 542.11(a)(1) (warden, Regional Director, and General Counsel must "[e]stablish procedures for receiving, reviewing, investigating and responding to complaints or appeals submitted by an inmate"). No hearing is required. In sum, the main right conferred on inmates is the right to receive written responses to their complaints from three levels of the BOP administrative hierarchy.

2. While incarcerated in the federal penitentiary at Leavenworth, Kansas,[2] petitioner John J. McCarthy filed

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[1] The deadlines for responses by the warden, Regional Director and General Counsel may be doubled where necessary. 28 C.F.R. § 542.14. The deadlines for inmate filings may be extended by unspecified amounts for unspecified "valid reason[s]." *Id.* §§ 542.13(b), .15.

[2] Petitioner, who is serving time on a Connecticut conviction, was initially transferred to the federal system pursuant to 18 U.S.C. § 5003. At the time he filed both his complaint and his petition for certiorari in this case, he was incarcerated at Leavenworth. Subsequently, but before he filed his reply brief in support of the petition in this Court, petitioner was transferred from Leavenworth

a *pro se Bivens* action on April 3, 1990, against four prison employees—the hospital administrator, the chief psychologist, and two physicians. In his complaint,[3] petitioner claimed that defendants had abridged his Eighth Amendment rights through deliberate indifference to his serious medical needs. J.A. 9-10.[4] More specifically, he alleged that in the two months following surgery on his spinal column at a prison hospital, he had suffered from persistent and severe back pain, for which he repeatedly but unsuccessfully sought effective treatment from the defendants. *Id.* The pain resulting from his condition, petitioner contended, had caused him to "persistently stay[] up at all hours of the night" and to lie "on the floor and pull on his legs," which in turn "cause[d] his cellmate to [be] kept up and cause[d] problems between them." *Id.* at 9. Construed liberally, McCarthy's complaint also alleged that his pain was exacerbated by his inability "to cope with stress," a psychiatric condition for

to another federal facility. *See* Reply Br. for Petitioner 3. At present, he is incarcerated at the Connecticut Correctional Institution at Somers.

[3] Petitioner actually filed two separate complaints on the same day: one a standard form used for prisoner complaints which he filled in (*see* J.A. 2-6), the other typed out on blank paper (*see* J.A. 7-11). For the purposes of this brief, we refer to them together as a single complaint.

[4] Petitioner also alleged a violation of 18 U.S.C. § 4042, which requires the Bureau of Prisons to "provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise." 18 U.S.C. § 4042(2). *See* J.A. 10. Perhaps because courts have uniformly held that Section 4042(2) provides no private right of action, *see, e.g., Chinchello v. Fenton*, 805 F.2d 126, 134 (3d Cir. 1986); *Williams v. United States*, 405 F.2d 951, 954 (9th Cir. 1969); *Gibson v. Matthews*, 715 F. Supp. 181, 188-90 (E.D. Ky. 1989), *aff'd on other grounds*, 926 F.2d 532 (6th Cir. 1991), both the district court and the court of appeals characterized petitioner's complaint as alleging only an Eighth Amendment violation and ruled on this basis. *See* J.A. 12, 16-17.

which he had received treatment in the past. *Id.* at 9-10. Petitioner further contended that his repeated requests for effective medical treatment were ignored or refused, that Dr. Walters refused to treat him, and that Chief Psychologist Perry "attempted to make a joke of the [w]hole situation and laughed." *Id.*

To redress these alleged constitutional violations, McCarthy sought damages "against each defendant individually and separately." *Id.* at 6.[5] Petitioner did not request declaratory or injunctive relief.[6] He stated repeatedly that he was seeking "money damages only," *see id.* at 6, 7, 8, 10, and went on to contend that, for this reason, he was not required to exhaust administrative remedies, *id.* at 6, 8.[7]

Three days after the complaint was filed, the district court dismissed McCarthy's action without prejudice on the ground that he had failed to demonstrate exhaustion of the BOP administrative remedies. *Id.* at 12. Relying

[5] Petitioner requested $100,000 in compensatory, $100,000 in punitive, and $100,000 in "[a]ctual" damages, as well as costs. J.A. 10.

[6] Though petitioner's complaint alleged that he had "requested a sing[le] cell and staff persistently [i]gnored him," J.A. 9; *see also id.* at 5 (alleging denial of single cell), his complaint did not seek transfer to a single cell as a remedy.

[7] Petitioner did state in response to questions on the inmate complaint form that he had filed a grievance under 28 C.F.R. § 542, which had been denied. J.A. 3-4. He also noted in passing that he was "[p]resently . . . appealing" this denial. *Id.* at 8 n.1; *see also id.* at 9 n.2 (noting that petitioner had "written the Warden who fails to respond"). At the time the complaint was filed, petitioner apparently had a pending administrative claim related to the "single cell" issue mentioned in the complaint. *See* Plaintiff's Motion for Relief from Judgment, Exh. A (Aug. 15, 1990). With respect to the medical issues at the heart of his complaint, however, petitioner did not file a grievance until after the federal complaint was dismissed. *See id.*, Exh. B. An appeal from the warden's denial of that grievance was ultimately rejected as untimely by the BOP regional office. *See id.*

on the Tenth Circuit's decision in *Brice v. Day*, 604 F.2d 664 (10th Cir. 1979), *cert. denied*, 444 U.S. 1086 (1980), the district court held that "[u]se of the administrative remedy process is a prerequisite to federal judicial review." J.A. 12. The court explained that "the administrative remedy process is necessary for the proper and effective handling of prisoner complaints and serves as a form of discovery in an attempt to resolve the grievance." *Id.*

On appeal, the Tenth Circuit affirmed. J.A. 16-19. The court of appeals rejected petitioner's argument that the exhaustion requirement recognized in *Brice* should not apply where a prisoner seeks only damages—a remedy not provided in the grievance process. The court held that preliminary administrative "factfinding" is just as necessary in a pure damages case as in an injunctive case, "to determine whether there is a possible *Bivens* cause of action." *Id.* at 17 (quoting *Brice*, 604 F.2d at 666). In so doing, it expressly disagreed with decisions in two other circuits—*Muhammad v. Carlson*, 739 F.2d 122 (3d Cir. 1984), and *Goar v. Civiletti*, 688 F.2d 27 (6th Cir. 1982)—which held that exhaustion is not required in a pure damages case. The court of appeals also observed that "administrative consideration of the possibility of corrective action and a record would have aided a court in measuring liability and determining the *extent* of the damages." J.A. 18 (emphasis in original) (citation and internal quotations omitted). Finally, the Tenth Circuit noted petitioner's allegation in his complaint that he "had invoked the prison grievance procedure prior to filing this suit," but added that petitioner did not challenge the district court's finding of failure to exhaust. *Id.* at 19.[8]

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[8] *See* note 7 *supra* (describing the grievances initiated both before and after the district court proceedings).

SUMMARY OF ARGUMENT

Because Congress has never mandated exhaustion of administrative remedies in *Bivens* cases, the Tenth Circuit's exhaustion requirement must stand or fall based on this Court's independent assessment of the relevant policy considerations. Such an assessment, drawing on the principles recognized in numerous prior cases, can lead to only one conclusion: requiring exhaustion of the BOP grievance procedure in all pure *Bivens* cases brought by federal prisoners would make no sense.

1. To begin with, for plaintiffs like petitioner who seek only damages for past constitutional violations, the BOP process is not an administrative "remedy" at all. That process was designed to achieve the expeditious, prospective resolution of routine inmate complaints. But, because it offers no form of compensation for past injuries, the BOP grievance procedure is inherently inadequate as a remedy for claimants seeking damages, and therefore cannot be a basis for delaying their access to court. *See, e.g., Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561, 587 (1989); *McNeese v. Board of Educ.*, 373 U.S. 668, 674-75 (1963).

Indeed, far from offering an alternate remedy, the grievance system, if made mandatory in all *Bivens* cases, would be transformed into a trap for unwary inmates seeking to vindicate their constitutional rights. Such inmates, to avoid forfeiting their constitutional claims, would have to initiate an administrative action almost immediately and pursue three inevitably futile levels of review within very short time deadlines. The courts, in turn, would ultimately be called on to resolve a host of complex issues involving whether inmates did or did not properly exhaust the grievance process.

Finally, we note that there is an incongruity between the typical *Bivens* suit and this supposed alternate rem-

edy. *Bivens* cases—where the defendants are federal employees in their individual capacities—serve a distinctive deterrence function. *See Carlson v. Green*, 446 U.S. 14, 20-21 (1980). Yet in the BOP grievance process, alleged individual wrongdoers play no formal role at all. Conversely, where the alleged wrongdoer is the warden, who is required to handle the grievance at the first level, there is a built-in conflict of interest.

2. The policy arguments for exhaustion advanced by respondents do not withstand scrutiny. The BOP process, by its very nature, cannot "develop" the facts in any meaningful way that will facilitate handling of a subsequent *Bivens* suit. Nor is there any reason to suppose that requiring prior resort to the BOP procedure will significantly lessen the number of pure damages cases ultimately filed in court.

Ultimately, respondents' main point seems to be that the courts should embrace any available procedure that can erect a barrier to prisoner suits, regardless of how futile and unfair it may be. The Court should reject this invitation. If there is a need for an administrative stage in the consideration of federal prisoners' *Bivens* claims, Congress is fully capable of creating a suitable procedure.

ARGUMENT

A rule requiring federal prisoners to exhaust the BOP grievance procedure before seeking damages in *Bivens* suits, whatever its superficial appeal, ultimately would be indefensible. The grievance procedure was designed to serve an entirely different function. To engraft it onto all *Bivens* cases would be to condition the enforcement of constitutional rights on completion of an elaborate series of preliminary procedures that (1) cannot provide the relief sought and (2) serve no other legitimate purpose.[9]

I. FOR CLAIMANTS SEEKING ONLY DAMAGES, THE GRIEVANCE PROCEDURE IS NOT A "REMEDY" AT ALL.

The only basis for imposing an exhaustion requirement here would be an independent judicial assessment of the value of the BOP grievance process as a preliminary "remedy" in *Bivens* cases. Congress has neither man-

[9] Although petitioner is now back in state custody, *see* note 2 *supra*, and the grievance procedure is applicable only to persons in federal custody, 28 C.F.R. § 542.10, there remains a live controversy in this case. There is a serious question whether, without relief from this Court, petitioner could now refile his complaint in the district court and claim an exemption from exhaustion rules based on the fact that he is out of federal custody. As discussed in note 7 *supra*, after petitioner's original complaint was dismissed, he initiated but failed to complete the BOP grievance process in timely fashion. At that point, if exhaustion was in fact required, his *Bivens* claim was arguably forfeited. *Cf. Pittston Coal Group v. Sebben*, 488 U.S. 105, 121-23 (1988) (forfeiture through failure to appeal erroneous administrative black-lung ruling); *Maulick v. Central Classification Bd.*, 659 F. Supp. 24, 27 (E.D. Va. 1986) (forfeiture of Section 1983 claim due to failure to complete state grievance process that had been approved under 42 U.S.C. § 1997e). In sum, the only way that petitioner's rights can be protected is for this Court to rule that his *Bivens* claim was *not* forfeited when he failed to complete exhaustion, either (1) because exhaustion is not required at all in pure damages cases or (2) because petitioner's previously barred claim was revived when he left federal custody.

dated the creation of a BOP grievance system nor directed that the existing system be exhausted in *Bivens* cases.[10] Moreover, as we discuss *infra*, the BOP never intended the grievance system to be more than an informal process for handling routine complaints, largely unrelated to the adjudication of legal claims. Thus, the Court is here being invited to create a new exhaustion requirement on its own initiative, borrowing an administrative remedy that happens to be available. However, because that grievance process offers no remedy at all to a claimant who seeks only compensation for past injuries, this invitation clearly must be rejected.

A. The Grievance Procedure is Inherently Inadequate.

The policies underlying the exhaustion doctrine are well established. By requiring a potential litigant to seek relief through administrative channels before taking his grievance to court, the doctrine preserves the proper role of specialized administrative agencies and benefits the court system as well. The agency is accorded a full opportunity to consider those matters within its purview and, where its own prior conduct is at issue, to correct its own errors. *See, e.g., Bowen v. City of New York*, 476 U.S. 467, 484-85 (1986); *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975). At the same time, the courts benefit because many disputes are resolved administratively

[10] The only statutory basis cited by the BOP when it promulgated the procedure was a collection of general statutes delegating authority over the federal prison system. *See* 28 C.F.R. § 542.10 (citing, as authority, 18 U.S.C. §§ 4001, 4042, 4081-82, 5015, 5039 and 28 U.S.C. § 509). Even Section 4001(b)(1), which vests the "control and management of Federal penal and correctional institutions" in the Attorney General and authorizes him to "promulgate rules for the government thereof," provides no basis for inferring that Congress intended (or even foresaw) the development of an administrative remedy procedure. *Compare* 18 U.S.C. § 4126(c)(4) (specifically authorizing Attorney General to promulgate rules for payment of compensation from Prison Industries Fund to inmates injured while working in federal prison industries).

and, even when litigation remains necessary, the agency will have already developed a factual record and applied its specialized expertise. *See, e.g., Salfi*, 422 U.S. at 765; *McKart v. United States*, 395 U.S. 185, 195 (1969).

All of these policies, however, presuppose an administrative procedure that is adequate to the task at hand. "[I]t is elementary that the exhaustion [doctrine] contemplates an efficacious administrative remedy." *Humana of South Carolina, Inc. v. Califano*, 590 F.2d 1070, 1081 (D.C. Cir. 1978) (footnote and internal quotes omitted). Thus, exhaustion is required only when the agency is prepared to consider the grievance fairly and expeditiously, and provide the relief sought if appropriate. *See, e.g., Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561, 587 (1989) ("Administrative remedies that are inadequate need not be exhausted."); *McNeese v. Board of Educ.*, 373 U.S. 668, 674-75 (1963) ("[I]t is by no means clear that Illinois law provides petitioners with an administrative remedy sufficiently adequate to preclude prior resort to a federal court for protection of their federal rights."). Where these criteria are not met, the agency cannot claim that it deserves the opportunity to hear the grievance first, and the courts are unlikely to benefit from exhaustion because few cases will be resolved short of litigation and the administrative record will be inadequate, irrelevant, or both.

This is just such a case. Characterization of the BOP grievance procedure as a "remedy" relating to petitioner's constitutional claim is simply a misnomer. The regulations expressly exclude any consideration of "tort claims," 28 C.F.R. § 542.12, and, while the precise scope of this exclusion is unclear, it reflects at a minimum the undisputed fact that the grievance procedure offers no form of compensation for past injuries. In sum, petitioner had no chance of winning the relief he was directed to seek in the grievance process.

The inadequacy of the BOP remedy is not surprising in light of its origin and structure. First promulgated in the Code of Federal Regulations in 1979, the current grievance procedure replaced a less detailed but essentially identical scheme adopted in 1974. *See* Bureau of Prisons Policy Statement 2001.6A (Nov. 1, 1974), *reprinted in Civil Rights for Institutionalized Persons: Hearings on H.R. 2439 and H.R. 5791 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 714-16 (1977). There is no indication that either grievance process was ever intended as anything more than an informal complaint mechanism unrelated to the adjudication of legal rights. In fact, in 1974 the BOP expressly told inmates that they need not exhaust prior to filing suit. *Id.* at 714 ("An offender may, if he chooses . . . file his law suit directly with the appropriate court."). And nothing done or said in 1979 suggests a different view. *See* 28 C.F.R. § 542.10 *et seq.* (1990); 44 Fed. Reg. 62,248 (Oct. 29, 1979).

As one would expect of an informal complaint process, the BOP procedure provides neither for formal findings of fact nor for the application of particular laws or rules. Instead, it constitutes a structured "dialogue" between inmates and administrators. The inmate submits a grievance, receives a response from the warden, and can appeal if he is not satisfied with the response. The appeals, in turn, involve further submissions of the grievance and responses from the regional and central offices of the BOP. While such a grievance process may be desirable as a matter of prison administration, it is equally clear that the only relief that can, or should, emerge from such a process is voluntary, prospective changes in prison administration.

As the cases cited above demonstrate, in any other context it would be considered absurd to suggest that a potential litigant must exhaust a remedy that cannot provide any meaningful relief. Here, we are dealing with *three* levels of totally futile administrative review,[11] each of which would have to be exhausted in every case where the inmate seeks only monetary compensation.[12] Predictably, when the shoe was on the other foot—*i.e.*, when the Attorney General was directed to set minimum standards that *state* prison grievance procedures must meet to qualify for mandatory exhaustion under the Civil Rights for Institutionalized Persons Act, 42 U.S.C. § 1997e—those standards included a requirement that state procedures "afford a successful grievant a meaningful remedy." 28 C.F.R. § 40.6.[13] It is hard to see why a different rule should apply here.

[11] While the BOP officials might conclude that the conduct at issue was inappropriate as a matter of policy, they would have no reason to address its constitutionality. *See* J.A. 17 (ruling below) (" 'this administrative consideration is not to resolve constitutional issues' ") (quoting *Brice v. Day*, 604 F.2d 664, 667 (10th Cir. 1979), *cert. denied*, 444 U.S. 1086 (1980)). Thus, a claimant could not hope to win even a declaratory judgment with respect to the merits of his prospective *Bivens* claim.

[12] An additional complication is created by the fact that an inmate seeking to join a *Bivens* claim with a claim against the United States under the Federal Tort Claims Act would have to exhaust two quite different administrative remedies simultaneously. Under the FTCA procedure, the claim is filed with the BOP regional office, there is an investigation by the warden's designee, and a single determination is issued by the BOP Regional or General Counsel within six months. *See* 28 C.F.R. § 543.31.

[13] We note that the BOP procedure also omits two features that were specifically mandated by Congress for state systems qualifying for mandatory exhaustion—"an advisory role for employees and inmates . . . in the formulation, implementation, and operation of the system" and "safeguards to avoid reprisals." *See* 42 U.S.C. § 1997e(b)(2). Thus, the ruling below creates the anomaly that federal prisoners are forced to exhaust under circumstances where state prisoners could go straight to court under 42 U.S.C. § 1983.

B. Exhaustion Would Create Inordinate Burdens and Risks.

The inevitable futility of the grievance procedure is not its only flaw as a mandatory alternate "remedy" for those seeking to bring *Bivens* claims. The multiple layers of review in the regulations—obviously intended as a protection for inmates—would become a series of hurdles, each of which must be jumped in timely fashion in order to preserve the inmate's right to bring a later *Bivens* action. *Cf. Pittston Coal Group v. Sebben*, 488 U.S. 105, 121-23 (1988); *Heckler v. Ringer*, 466 U.S. 602, 617-19 (1984).

Thus, the regulations require the inmate, after attempting informal resolution of the grievance through "local procedures," to file a grievance within 15 days of the incident. If the inmate is dissatisfied with the warden's response, he has 20 days in which to file an appeal with the BOP Regional Director. If the response is again unsatisfactory, the inmate has 30 days in which to appeal to the BOP Office of General Counsel.

These time limits—although suitable for an informal grievance process—become traps for the unwary if timely and complete exhaustion of that process becomes a mandatory predicate for a lawsuit. In effect, an inmate must decide almost instantly that he wants to bring a *Bivens* suit challenging a particular incident, since he must complete informal resolution efforts in time to file a formal grievance within 15 days of the incident. And he must be sure not to miss the deadlines for the two appeals that are inevitable if the only relief he seeks is damages.[14] Ironically, under the Government's theory, an inmate who completes the administrative process successfully then

[14] *See Maulick v. Central Classification Bd.*, 659 F. Supp. at 27 (dismissing state prisoner's § 1983 claims where prisoner failed to pursue grievance through all levels of CRIPA-qualified grievance procedure).

may have several years (depending on the applicable statute of limitations) in which to proceed to court. Obviously, this is not a rationally designed system.

The grievance procedure, if made mandatory for *Bivens* claimants, would also require federal courts to consider new and complex issues.[15] For example, each of the inmate filing deadlines in the regulations may be extended by the BOP for an unspecified "valid reason." 28 C.F.R. §§ 542.13(b), .15. If the inmate has sought an extension and been denied, the court may be forced to decide whether his failure to make a timely filing should be excused. *Cf. Greene v. Meese*, 875 F.2d 639, 641 (7th Cir. 1989). Similarly, the regulations provide that an inmate may file a grievance first with the Regional Director if he believes that "the complaint is sensitive and that he would be adversely affected if the complaint became known at the institution." 28 C.F.R. § 542.13(c). The Regional Director, however, may decline to accept the complaint if he disagrees with this assessment. *Id.* Here again, courts may become embroiled in disputes about where a complaint should have been initiated.

These problems, of course, are a direct result of borrowing a grievance procedure that was intended for a purpose unrelated to *Bivens* litigation. If Congress set out to design a prior administrative remedy for *Bivens* cases, there is every reason to believe it would look quite different. In the absence of legislation, it makes no sense to instruct inmates that the enforcement of their constitutional rights depends on full exhaustion of a patently unsuitable process.

[15] *See Patsy v. Board of Regents*, 457 U.S. 496, 513-15 (1982) (cataloguing issues that can arise when courts create exhaustion requirements); Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 Harv. L. Rev. 610, 645 (1979) (arguing that exhaustion requirement in prisoner suits "would not necessarily . . . conserve judicial resources" since "each case would involve new issues—the availability and adequacy of the . . . remedies and whether the plaintiff's actions amount to exhaustion").

C. An Appropriate Administrative "Remedy" Would Require Different Parties and Different Decisionmakers.

We note, finally, that characterizing the grievance procedure as a potential "remedy" for petitioner would be inappropriate even if the procedure were modified to allow for damage awards—for reasons having to do with the identity of the participants in that process. The only participants are (1) the inmate and (2) the warden and his superiors, who all speak for the Government. Since there are no hearings, there are no witnesses. This means that in most cases, the potential individual *Bivens* defendants have no formal role in the process.

It is well established, however, that regardless of whatever relief a claimant may be able to obtain from the government for a constitutional violation, a *Bivens* action against the individual wrongdoer serves an independent deterrence function. *See Carlson v. Green*, 446 U.S. 14, 20-21 (1980); 28 U.S.C. § 2679(b)(2)(B) (preserving *Bivens* claims from FTCA preemption). In view of this distinction it would make no sense to require a *Bivens* claimant to exhaust a grievance procedure where, in the usual case, he cannot even make the potential individual defendants show up and answer personally for their actions.[16]

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[16] The United States is not here arguing in favor of the Fifth Circuit's rule requiring plaintiffs asserting only *Bivens* claims to exhaust the separate FTCA administrative procedure in 28 C.F.R. §§ 543.30-.32 (1990), where limited damages are available. *See Hessbrook v. Lennon*, 777 F.2d 999 (5th Cir. 1985). We note, in any event, that the Fifth Circuit's rule would be equally subject to the criticism that it mandates exhaustion of a procedure with the wrong "defendant." More fundamentally, the FTCA administrative procedure is expressly limited to "claims asserted under the Federal Tort Claims Act," 28 C.F.R. § 543.30, and the FTCA does not even cover all the constitutional claims that may be asserted under *Bivens*, *see Carlson v. Green*, 446 U.S. at 23.

Conversely, in some cases, the potential *Bivens* defendant will be the very person—the warden—required to consider the grievance at the first stage. *See* 28 C.F.R. § 542.11(a)(4). Here, the problem is the inevitable conflict of interest that arises when the potential defendant is also the decisionmaker speaking for the BOP. In other contexts, this Court has cited such conflicts as a reason why an administrative procedure is too inadequate to justify mandatory exhaustion. *See Felder v. Casey*, 487 U.S. 131, 149 (1988) ("While the exhaustion required by Wisconsin's notice-of-claim statute does not involve lengthy or expensive administrative proceedings, it forces injured persons to seek satisfaction from those alleged to have caused the injury in the first place."); *Coit Independence Joint Venture v. FSLIC*, 489 U.S. at 587 (problems with FSLIC administrative procedure are exacerbated by fact that FSLIC is often the main competing creditor and thus has incentives to delay relief to claimant). This principle is equally applicable here.

II. THE OTHER POLICIES SUGGESTED BY RESPONDENTS DO NOT JUSTIFY AN EXHAUSTION REQUIREMENT.

Despite the obvious futility and burdens of the grievance process, respondents have suggested that other policies argue in favor of requiring exhaustion before the filing of *Bivens* cases. In particular, they suggest that the grievance process may serve to develop the relevant facts, resolve some disputes before they go to court, and preserve the integrity of the BOP procedure. These arguments are clearly unavailing.

To begin with, we know of no authority for the proposition that a potential plaintiff may be required to exhaust an inherently futile or inadequate administrative process merely because such exhaustion could illuminate the relevant facts or cut down on the number of suits ultimately filed. Exhaustion is an appropriate requirement only

where the administrative process provides an adequate remedy so that the plaintiff has a realistic prospect of winning some measure of relief.

In any event, the alternative policies asserted here are largely illusory. The Tenth Circuit's primary rationale—that the BOP "administrative record" will allow a court "to determine whether appellant has a possible *Bivens* cause of action" in a given case, J.A. 19, is frankly baffling.[17] As already noted, the grievance procedure consists entirely of a series of written complaints by the inmate and responses by prison administrators. There is no provision for a hearing or findings of fact that could facilitate the disposition of a later court action. To the contrary, with or without exhaustion, the court could only rule on the merits of a *Bivens* claim after evidence is presented in the usual adversarial fashion—by affidavits in support of a summary judgment motion or through testimony at a hearing.[18]

It is true that administrators may be prodded by a grievance to investigate the relevant circumstances. But this opportunity is entirely one-sided; the inmate has no right to formal or informal "discovery" and is given only the information that the administrators choose to put in

[17] So, too, is the court of appeals' suggestion that " 'a record would have aided a court in . . . determining the *extent* of the damages.' " J.A. 18 (quoting *Goar v. Civiletti*, 688 F.2d 27, 29 (6th Cir. 1982)) (emphasis in original).

[18] In many exhaustion cases, courts have pointed to the desirability of allowing administrative agencies to apply their special expertise to a problem before it goes to court. *See, e.g., Weinberger v. Salfi*, 422 U.S. at 765. Here, however, this consideration is largely irrelevant since (1) analysis of the factual circumstances underlying a constitutional damages claim does not usually require specialized knowledge and (2) administrators in the grievance process do not even attempt to apply legal standards to the facts as they understand them. *Cf. Califano v. Sanders*, 430 U.S. 99, 109 (1977) ("Constitutional questions obviously are unsuited to resolution in administrative hearing procedures . . . .").

their written responses. More importantly, it is unclear why the opportunity for such an investigation should be, in effect, mandated prior to the initiation of a *Bivens* action. The defendants in a *Bivens* suit, after all, are individual alleged wrongdoers. They will generally have personal knowledge of their own conduct and their presentation of a defense will not be materially aided by a prior administrative investigation. At the same time, if prison administrators, for their own purposes, see a need to investigate a particular incident, they are free to do so at any time, regardless of any exhaustion requirements.

Respondents, unlike the Tenth Circuit, also argue that prior resort to the grievance procedure should be required because it may serve to resolve some disputes prior to the initiation of litigation. Br. in Opp. 7. This argument, of course, flies in the face of the acknowledged fact that the grievance procedure cannot provide the sole relief sought in a *Biven* damages action—*i.e.*, damages. Nevertheless, respondents suggest that, in some cases, the grievance process will persuade inmates not to proceed to court because it will provide them prospective relief. Here, for example, relying on the fact that petitioner's medical problems have been chronic, respondents suggest that petitioner is really challenging a "continuing prison practice," *id.* at 10, and might therefore be satisfied with some reforms won through the grievance process.[19]

While such a scenario cannot be ruled out, this possibility does not constitute a valid reason for requiring

[19] Respondents also contend that the grievance procedure may "filter[] out frivolous . . . disputes." Br. in Opp. 7. But it is not clear what this means, since the inmate is not bound by anything determined in the grievance process and the court could not rely on the BOP's conclusion that a claim is frivolous. It may be that in some small number of cases, the BOP's response to a grievance would convince the inmate that his claim is meritless. But in those few cases, absent exhaustion, plaintiffs would presumably be convinced to withdraw their *Bivens* claims as soon as the complaints were answered.

exhaustion. First, it bears emphasis that we are dealing here with plaintiffs who seek only compensatory relief. It may be, as some courts have held, that there is a legitimate basis for requiring exhaustion of the grievance procedure by claimants seeking prospective relief.[20] Where, by contrast, inmates deliberately forgo the option of seeking prospective equitable relief, it seems reasonable to presume that they will not be satisfied with voluntary prospective relief won in the grievance process. Indeed, in the usual case, a *Bivens* claim will involve a specific past incident—such as a beating or, as here, a particular failure to provide needed medical care—and thus prospective relief will be inherently irrelevant.

It may be that respondents intend to propose a rule that would require exhaustion by potential *Bivens* plaintiffs only in some circumstances—*i.e.*, when the underlying facts appear to suggest a continuing grievance. If so, however, they are departing from the rationale of the decision below, which neither focused on the possibility of prospective relief nor was limited to some subset of cases. Moreover, such a rule would be manifestly im-

[20] *See, e.g., Davis v. Keohane*, 835 F.2d 1147, 1148 (6th Cir. 1987); *Veteto v. Miller*, 794 F.2d 98, 99-100 (3d Cir. 1986). As these courts have recognized, the considerations relevant to the exhaustion question are quite different when an inmate seeks prospective equitable relief. *See Goar v. Civiletti*, 688 F.2d 27, 29 (6th Cir. 1982). In such a case, the grievance procedure is quite capable of producing the relief sought—*i.e.*, the termination of ongoing, objectionable conduct by prison officials or employees—and it does not matter that the process fails to address the legality of such conduct directly. Moreover, the short time deadlines in the BOP process are less of a concern in an injunctive case because, if an inmate misses a deadline, he can file a new complaint addressed to an ongoing problem. We note, however, that under Section 1983, claimants seeking injunctive relief, like those seeking damages, generally are not required to exhaust state administrative remedies. *See Patsy v. Board of Regents*, 457 U.S. at 498 (complaint sought injunction as well as damages).

possible to administer, since it would require an individualized determination concerning which *Bivens* claims arise from continuing problems as opposed to isolated incidents. *See McCarthy v. Bronson*, 111 S. Ct. 1737, 1742 (1991) ("[T]he distinction between cases challenging ongoing [prison] conditions and those challenging specific [past] acts of alleged misconduct will often be difficult to identify.").

It makes far more sense to allow inmates with potential constitutional claims, like any other plaintiffs, to decide for themselves the nature of their claim. Exhaustion requirements would then turn on whether the complaint seeks purely compensatory relief or includes a claim for prospective equitable relief as well.

Finally, respondents seem to argue that it would be inappropriate to allow inmates to "bypass" *any* "established procedure[]," Br. in Opp. 7, even asserting that it would "undermine prison discipline" to allow inmates to go directly to court, *id.* at 5.[21] Ultimately, the suggestion seems to be that the courts not ignore any barrier to lawsuits by inmates that can be erected on the basis of any administrative procedure found in the Code of Federal Regulations—however inadequate and futile that procedure may be. Such a suggestion, far from articulating a valid policy basis for requiring exhaustion, merely reflects antipathy to the proposition that prisoners, like all others who are deprived of constitutional rights under color of federal law, should have a plain and speedy remedy. *Cf. Felder v. Casey*, 487 U.S. at 149-50 (rule designed to protect state officials by limiting claimants'

[21] We note that, absent an exhaustion requirement, the grievance procedure will hardly become a dead letter. The vast majority of inmate grievances presumably have nothing to do with constitutional claims that are ultimately asserted in court. Even when there is some overlap, inmates are likely to present their problems with particular employees to prison administrators through the grievance process while also seeking compensation through a court action.

access to court is plainly inconsistent with the central objectives underlying section 1983).[22]

In any event, if there is some reason for concern about prisoners taking their grievances directly to court, Congress is free to create a procedure that offers inmates the chance to win the compensation they currently seek through *Bivens* actions. Such a procedure, if optional, might commend itself to inmates as a better alternative than litigation. It might also be made mandatory, along the lines of the CRIPA system for state prisoners. But Congress simply has not, so far, taken this step.

[22] While some judges and commentators have expressed concern over the number of prisoner lawsuits in the federal courts, that concern simply does not warrant the imposition of an exhaustion requirement in *Bivens* actions. To begin with, the vast majority of prisoner civil-rights actions in the federal courts are brought by *state* prisoners under 42 U.S.C. § 1983. *See* 1990 Annual Report of the Director of the Administrative Office of the United States Courts, App. I, at 33 (Table C2) (of 25,992 prisoner civil-rights actions commenced in the federal courts between July 1, 1989 and June 30, 1990, a total of 24,843—or 95.6%—were brought by state prisoners); *see also* Note, *Resolving Prisoners' Grievances Out of Court: 42 U.S.C. § 1997e*, 104 Harv. L. Rev. 1309, 1313 n.26 (1991). Moreover, of the 1,149 civil rights actions brought by federal prisoners in that period, the Administrative Office's statistics do not indicate what fraction advanced *only* a damages claim under *Bivens*, as opposed to a claim for declaratory or injunctive relief. *See* Note, 104 Harv. L. Rev. at 1313 n.26. Finally, the burden imposed by a prisoner lawsuit on federal judicial resources should not be overestimated. As this Court observed not long ago, "the vast majority of prisoner cases are resolved on the complaint alone." *Cleavinger v. Saxner*, 474 U.S. 193, 207-08 (1985).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

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DEPARTMENT OF JUSTICE, BUREAU OF PRISONS: ADMINISTRATIVE REMEDY PROCEDURE FOR INMATES
28 C.F.R. § 542.10 *et seq.*

§ 542.10 Purpose and scope.

The Bureau of Prisons has established an Administrative Remedy Procedure through which an inmate may seek formal review of a complaint which relates to any aspect of his imprisonment if less formal procedures have not resolved the matter. This procedure applies to all inmates confined in Bureau of Prisons institutions, but does not apply to inmates confined in non-federal facilities.

§ 542.11 Responsibility.

(a) The Warden, Regional Director, and General Counsel are responsible for the operation of the Administrative Remedy Procedure at the institution, regional and central office levels, respectively, and shall:

(1) Establish procedures for receiving, reviewing, investigating and responding to complaints or appeals submitted by an inmate;

(2) Acknowledge receipt of a complaint or appeal by returning to the inmate a signed receipt;

(3) Conduct an investigation into each complaint or appeal;

(4) Respond to and sign all complaints or appeals filed at their level. This responsibility may not be delegated further.

(b) Inmates have the responsibility to present complaints in good faith and in an honest and straightforward manner.

§ 542.12 Issues improperly filed.

Filings will not be accepted under the Administrative Remedy Procedure for tort claims, Inmate Accident Compensation claims, Freedom of Information or Privacy Act requests, or complaints on behalf of other inmates.

§ 542.13 Initial filing.

(a) *Informal resolution.* Inmates shall informally present their complaints to staff, and staff shall attempt to informally resolve any issue before an inmate files a request for Administrative Remedy. The Warden may establish local procedures to ensure that attempts at informal resolution are made.

(b) *Filing.* If an inmate is unable to informally resolve his complaint, he may file a formal written complaint, on the appropriate form, within fifteen (15) calendar days of the date on which the basis of the complaint occurred. Where the inmate demonstrates a valid reason for delay, an extension in filing time shall be allowed. An extension in the time for filing shall be allowed when an inmate indicates and staff verify that a response to the inmate's request for copies of dispositions requested under section 8 of this Program Statement (§ 542.16) has not been received. An inmate may obtain assistance in preparation of his complaint or appeal from other inmates or from institution staff.

(c) *Sensitive complaints.* If the inmate believes the complaint is sensitive and that he would be adversely affected if the complaint became known at the institution, he may file the complaint directly with the Regional Director. The inmate must explain, in writing, the reason for not filing the complaint at the institution. If the Regional Director agrees that the complaint is sensitive, he shall accept and respond to the complaint. If the Regional Director does not agree that the complaint is sensitive, he shall advise the inmate in writing of that determination, without a return of the complaint. The inmate may pursue the matter by filing the complaint locally with the Warden.

(d) *Control Unit Appeals.* Appeals relative to Control Unit placement may be filed directly with the General Counsel.

[44 FR 62250, Oct. 29, 1979, as amended at 44 FR 76726, Dec. 27, 1979]

§ 542.14 Remedy processing.

Response time limits. A complaint or appeal is considered filed when the receipt is issued. Once filed, response shall be made by the Warden within fifteen (15) calendar days, by the Regional Director within thirty (30) calendar days, and by the General Counsel within thirty (30) calendar days. If the complaint is determined to be of an emergency nature which threatens the inmate's immediate health or welfare, the Warden shall respond within 48 hours of receipt of the complaint. If the period of time for response to a complaint or appeal is insufficient to make an appropriate decision, the time for response may be extended once by the same amount of time as originally allowed for response. Staff shall inform the inmate of this extension in writing. If the inmate does not receive a response within the time allotted for reply, including extension, the inmate may consider the absence of a response to be a denial at that level. Staff shall, however, respond to all filed complaints.

§ 542.15 Appeals.

Filing. If an inmate is not satisfied with the Warden's response, that response may be appealed on the appropriate form to the Regional Director within twenty (20) calendar days of the date of the Warden's response. If the inmate is not satisfied with the Regional Director's response, that response may be appealed on the appropriate form to the General Counsel within thirty (30)

calendar days from the date of the Regional Director's response. Where a valid reason for delay is stated by an inmate these time limits may be extended. Appeal to the Office of General Counsel is the final administrative appeal in the Bureau of Prisons.

§ 542.16 Index and access.

Disposition access. Inmates and members of the public may request access to Administrative Remedy indexes and to responses by case number at the location where they are retained. Copies, with names and other identifiers deleted, may be inspected during regular office hours or may be purchased.